IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 565 of 2000

For Approval and Signature:

HONOURABLE MR.JUSTICE C.K.BUCH
HONOURABLE MS.JUSTICE H.N.DEVANI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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MITIYO @ MITESH RAMJIBHAI - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
MR PJ YAGNIK for Appellant
MR RM CHAUHAN, APP for Opponent
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CORAM : HONOURABLE MR.JUSTICE C.K.BUCH
and
HONOURABLE MS.JUSTICE H.N.DEVANI

Date : 22/03/2006

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE C.K.BUCH)

1.The present appeal is filed against the order

of conviction and sentence passed by the learned Additional Sessions Judge, Gondal, while concluding the trial of the Sessions Case No.116 of 1999, whereby the learned trial Judge has held the appellant accused guilty of the offences punishable under Section 367 and 377 of the Indian Penal Code (for short “IPC”). For the offence under Section 367 of IPC, the learned trial Judge imposed rigorous imprisonment for 10 years and fine of Rs.5,000/-, in default, to undergo rigorous imprisonment for six months. For the second offence punishable under Section 377 of IPC, the learned trial Judge imposed rigorous imprisonment for 10 years and fine of Rs.10,000/-, in default, to undergo rigorous imprisonment for one year. It is held by the learned Judge that if fine is recovered, 80% amount be paid to victim of the offence i.e. Ashok Nanji as compensation.

2.The order of conviction is assailed on various grounds placed before us by Mr.Yagnik. As such, there is no formal memo of appeal. On a written application received from the appellant convict addressed to the Hon'ble Chief Justice, this Court has registered the appeal.

3.To appreciate the legality and validity of the order of conviction and sentence, firstly, it would be appropriate for us to state the facts in brief placed before the trial Court by prosecution. It is the case of the prosecution that, on 6th June 1999, minor Ashok, son of the complainant – Nanjibhai Pragjibhai Vaghela was kidnapped by the appellant accused when he was playing with his friend and relative Gulab in town Jetpur of Dist. Rajkot. This Ashok was going on a bicycle with Gulab to fetch a small packet of tobacco chewables and from there, Ashok was taken by the accused to the area where there are babul trees near Navagadh

railway station, which is in the vicinity of town Jetpur and the accused committed the offence punishable under Section 377 IPC. Normally, Ashok was returning to his house any time between 8.00 to 8.30 p.m. if he had gone somewhere else to play with the friends or relatives and when it was found that Ashok has not returned, the complainant and father of Ashok started searching for him, and he was informed by Gulab that Ashok has been taken by the appellant accused, popularly known as “Mitiyo”. On getting this information, family members started searching Ashok with great anxiety including the complainant and Gulab. Gulab, on the date of incident, was of about 12 years of age. Initially, they had gone to a public garden of Jetpur municipality, but Ashok was not found there and thereafter, they went to Navagadh police station area, where both the complainant and Gulab saw the accused committing the unnatural sexual intercourse

with minor Ashok. On seeing the complainant, the accused tried to escape from the spot. There was some event of scuffle, but the accused was able to escape. Ultimately, the father returned with his son minor Ashok. It appears that, thereafter, there was some discussion as to the entire event between minor Ashok and Fatuben, mother of Ashok and wife of complainant. AT one place, the prosecution has tried to say before the court that immediately the police station was approached, but they were asked to come in the morning for lodging the complaint. Without entering into this controversy, it appears that the case of the prosecution is that, on the complaint given by Nanjibhai Pragjibhai Vaghela, the offence against the accused came to be registered on the next day i.e. on 7th June 1999 at about 9.40 a.m. It is also the case of prosecution that, in the morning, minor Ashok had felt pain and some bleeding and this fact was noticed by the

mother Fatuben and therefore, the minor boy was taken for treatment and examination under a police yadi at about 10.45 a.m. on 7/6/1999. Dr.Naginbhai Bhovanbhai Sarvaiya, examined minor Ashok and gave some treatment to him. Accused was not traceable. It is the case of prosecution that ultimately on 10th September 1999, after lapse of about three months, he was traced and arrested with the help of Surat police at Surat, when he was taking shelter with his real sister, who is settled in some Varachha area of Surat city. Thereafter, accused was also sent for medical examination. Necessary articles seized during the course of investigation were sent for analysis to Forensic Science Laboratory and on completion of the investigation, the police charge-sheeted the accused for above said two offences.

4.Considering the oral evidence of complainant Nanjibhai Vaghela, PW-2, exh.12, Fatuben, PW-4,

exh.14 and Gulab, PW-5, exh.15, the learned trial Judge has held that the accused has committed unnatural sexual intercourse with minor Ashok on 6/6/1999 at about 10.00 to 10.30 p.m. The learned trial Judge has considered the contents of the FIR and the FSL report submitted by the prosecution. Of course, there is nothing direct incriminating in the report received from the Forensic Science Laboratory, but while appreciating the oral version of the witnesses of finding of blood on the cloth of the minor etc., this report has been found relevant. The learned trial Judge has appreciated the stand taken by the defence side and explanation given by the accused in his statement recorded under Section 313 of the Code of Criminal Procedure. The conduct of the accused is also considered.

5.The evidence of Dr.Naginbhai, PW-1, exh.6, is also considered by the learned trial Judge and

the answers given by him as expert in the cross examination made on behalf of the accused. At relevant point of time, the accused was about 50 years of age. The allegation of the prosecution before the learned trial Judge was that the accused is a sex maniac and had committed more than one offences punishable under Sections 376 and 377 IPC etc. Adequate evidence as to the filing of the charge sheet and conviction recorded by the learned trial Judge was also placed before the court. We are not concerned with the history of the accused when he committed the alleged offences for which he was tried by the lower court qua the wrong committed by him against minor Ashok. We are also not concerned with the facts of one affidavit tendered by real sister of the accused whereby she has complained about the character and nature of the accused, because such evidence is inadmissible in eye of law and cannot be considered for recording conviction.

6.If we concentrate on the argument advanced before us by the learned APP Mr.R.M.Chauhan as regards the evidence led by the prosecution witnesses in this case, then only one inference is possible to draw that of guilt of the accused. This is a case of two eye witnesses of the incident. It is satisfactorily established that the accused was able to escape from the grip of the complainant father. Of course, Gulab, a teen-ager examined before the trial Court is a relative of the complainant and the victim boy, but his presence when the minor Ashok was taken by the accused and with the complainant when the accused was seen doing the offending act, is natural. The contradictions and omissions brought on record are minor in nature and the story placed by the prosecution remains consistent if the basic facts are kept in centre. After some deliberations, in response to query raised by

us, Mr.Yagnik, learned counsel appearing for the appellant, has fairly accepted that the judgment of the learned lower court is based on good reasons. However, the learned trial Judge has erred in considering the fact of registration of other offences in past. But, on close scrutiny of the judgement, it appears that the learned trial Judge has considered all these aspects while awarding substantive sentence to the accused. Conviction is recorded on independent finding and without prejudice to the facts placed by the investigating agency with the papers of investigation as to the past history and conduct of the accused. The learned trial Judge has observed that even for the sake of argument it is accepted that the appellant has been acquitted by the High Court or any other superior forum, it is clear that he was found involved in similar type of offences, and therefore, there was not need to take any

lenient view while imposing the substantive sentence. It is true that the complainant may not have approached the police station immediately on finding out Ashok, especially when he had seen personally the accused committing the offending act, but the time when they approached the police station is not found belated. Late filing of FIRs sometimes goes to the root of the case placed by the prosecution. But it is not possible for us to infer that the time spent by the complainant in filing formal FIR with the police has been used to concoct a story. Of course, it is not placed on record, but it is possible for us to draw reasonable inference that the parents might not have thought to go to the police station because the disclosure may have a stigma in a future life of Ashok. But it appears that, when the anus of Ashok was found bleeding in the morning by Fatuben, they were compelled to take the boy to a doctor and therefore, they must have opted to

approach the police station first and thereafter, the boy was taken to the hospital. This version of Fatuben, if appreciated in the background of the event narrated by the complainant and Gulab, then, according to us, the finding recorded by the learned trial Judge appears to be based on sound reasons and we are unable to accept the argument of Mr.Yagnik that the recording of conviction and passing the punishment is either bad or illegal.

7. As per settled legal position when the appellate forum is able to express concurrence with the findings recorded by the lower court, then the appellate forum can adopt the reasons assigned by the learned trial Judge for confirming the order. Here, the say of the prosecution is that the clothes put on by Ashok were found bloodstained when he was brought at the residence, and if the laboratory report corroborates that say and when it is not the

say of doctor PW-1 that Ashok was suffering from any ailment of the anus, and there was possibility of bleeding because of that ailment, then it was not possible for the learned trial Judge to infer contrary to the inference drawn by him. Of course, there is no formal deposition of minor Ashok on record. But, it is not the case before us that he was never tendered before the court by the prosecution. The prosecution had tendered the minor witness Ashok before the court for examination, but the learned trial Judge, who is the best judge of the situation and competent officer to record the satisfaction by observing the mannerism and other conduct of the witness that the witness Ashok is not in a fit state of mind to depose. When the offending act was committed, he was about 5 years and when he was brought for examination, he may be of 6 or 6.1/2 years of age. As per the scheme of the Code of Criminal Procedure

and the accepted proposition of Criminal Jurisprudence, the accused obviously must be present in the court room. In those situation, if minor Ashok was not able to depose, then the learned trial Judge was supposed to record that the witness Ashok is not able to depose and therefore, he has not been examined in the trial. But the body of the person Ashok victim boy examined by the doctor was very well available when he was examined by Dr. Naginbhai Sarvaiya and if the evidence of this doctor is scrutinized in the background of the cross examination made, it takes us to one and only conclusion that sexual offence was committed against minor Ashok.

8.It is necessary to observe that, in more than one decisions, this Court and the Apex Court have observed that falsity of defence is also relevant in certain cases. In present case, the accused admitted to make a suggestion that

he has been implicated in such a serious offence, because he has serious disputes as to money payable to him against the goats sold to complainant Nanjibhai. But, the learned trial Judge has observed that there is nothing on record to show or prove that the accused was ever dealing in the business of sale of goats or sheep. It was suggested to doctor that the injuries found on the body of the person minor Ashok were possible if Ashok would have been asked to ride on bicycle rod without half pant. We are surprised how the learned trial Judge had allowed such a question and why the complainant should implicate the accused putting certain serious stigma on his son if the boy had sustained injuries in anus for some other or extraneous reasons. So, according to us, the judgment of the learned trial Judge of recording conviction is absolutely legal and the same is based on correct appreciation of oral as well as documentary evidence led before

it.

9. So far as the quantum of punishment is concerned, we are not inclined to accept the argument advanced by Mr.Yagnik that the conviction should be reduced to either 5 or 7 years. We would like to re-produce the relevant Section 367 of the IPC , which reads as under :

> **“367. Kidnapping or abducting in order to subject person to grievous hurt, slavery, etc.** - Whoever kidnaps or abducts any person in order that such person may be subjected, or may be so disposed of as to be put in danger of being subject to grievous hurt, or slavery, or to the unnatural lust of any person, or knowing it to be likely that such person will be so subjected to disposed of, shall be punished with imprisonment of either description

for a term which may extend to ten years, and shall also be liable to fine."

10.Kidnapping of a child or the unnatural lust of any person is the element to prove the offence of kidnapping. The deposition of Gulab is found trustworthy. It is corroborated by the complainant and Fatuben. The accused has committed offence under Section 377 of IPC and there are two eye witnesses to prove the offence punishable under Section 377 of IPC. So, it is legally possible to infer that kidnapping when made of minor Ashok was for one of the purposes mentioned in above section and therefore, we have underlined that portion of Section 367 of IPC. The maximum punishment prescribed is 10 years and this is a case wherein the learned trial Judge could not have imposed some punishment less than maximum prescribed. But it appears that the age of the accused and other offending act allegedly

committed by him in past, must have compelled the learned judge to pass punishment maximum prescribed for the wrong punishable under Section 367 of IPC and when an order of sentence passed is based on sound logic, and basic principles of criminology, then there is no need to interfere with such a finding. So far as the quantum of punishment imposed by the learned trial Judge qua the offence under Section 377 of IPC is concerned, the learned trial Judge has imposed 10 years imprisonment and the fact that the learned trial Judge has said that the accused shall undergo both these imprisonments concurrently, makes this order sound and legal. There is no need to reduce the quantum of punishment imposed for the offence punishable under Section 377 of IPC. It emerges that the accused is a sex maniac. He may be psychic patient and so, after getting all copies of the relevant judgments passed and the order of acquittal recorded by higher

forum, the learned trial Judge even could have imposed life imprisonment. But, considering the age when the accused committed the offence in question, the learned trial Judge imposed 10 years imprisonment by imposing fine of Rs.10,000/-. According to us, the fine imposed for both these offences is also adequate because the anxiety of the learned trial Judge appears that the victim boy should get some compensation. In short, according to us, there is no error in passing the order of punishment by the learned trial Judge. Thus, there is no merit in the appeal and therefore, the same requires to be dismissed, hence dismissed.

[C.K.BUCH, J.]

[HARSHA DEVANI, J.]

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